Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

PAUL WIMMER,

Petitioner,

v.

SUFFOLK COUNTY POLICE DEPARTMENT, AND JOHN GALLAGHER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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62pp

QUESTIONS PRESENTED

1. Section 704(a) of Title VII of the 1964 Civil Rights Act forbids an employer to discriminate against an employee "because he has opposed any practice made an unlawful employment practice by this title." Under what circumstances is it nonetheless lawful for an employer to dismiss an employee because he or she expressed opposition to intentional racial discrimination?

2. Should the "policy or custom" requirement of *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978), and its progeny be overturned or clarified?

PARTIES

The parties to this action are set forth in the caption.

The original complaint in this proceeding named as a defendant "Peter F. Cosgrove, Commissioner, Suffolk County Police Department." The complaint did not state more specifically whether Commissioner Cosgrove was sued in his official capacity or in his individual capacity. In the courts below this matter was litigated as a claim against Commissioner Cosgrove only in his official capacity; no monetary relief was sought from him personally. Accordingly, pursuant to Rule 25(d), Federal Rules of Civil Procedure, we have substituted the current Commissioner.

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Petitioner Paul Wimmer respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on May 5, 1999.

OPINIONS BELOW

The May 5, 1999, opinion of the court of appeals, which is reported at 176 F. 3d 125 (2d Cir. 1999), is set out at pp. 1a-21a of the Appendix. The February 10, 1997, oral opinion of the district judge dismissing petitioner's Title VII claim, which is not reported, is set out at pp. 22a-23a of the Appendix. The February 11, 1997, oral opinion of the district judge dismissing petitioner's section 1983 claim, which is not reported, is set out at pp. 24a-25a of the appendix.

JURISDICTION

The decision of the court of appeals was entered on May 5, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

Section 704(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-3(a), provides in pertinent part, "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . . became he has opposed any practice made an unlawful employment practice by this title." Section 1983 of 42 U.S.C. provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured

by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

Proceedings Below

Petitioner commenced this action in 1994 in the District Court for the Eastern District of New York, alleging that he had been dismissed from his position as a Suffolk County police officer because of his outspoken opposition to racial discrimination by the respondent police department. Petitioner asserted that his dismissal violated both the anti-retaliation provision of Title VII of the 1964 Civil Rights Act, section 704(a), and the First Amendment; petitioner brought his constitutional claim against the police department pursuant to 42 U.S.C. § 1983. Federal jurisdiction existed under 28 U.S.C. § 1343(3).

After extensive discovery the case was set for trial before a jury. At the close of the plaintiff's case, the district judge dismissed petitioner's Title VII claim; although the judge gave no reason for that action, it was taken in response to the respondents' argument that petitioner's opposition to racial discrimination fell outside the protection of section 704(a). (App. 22a-23a). After the completion of all testimony, the judge dismissed petitioner's remaining section 1983 claim. There was considerable evidence that a large number of officers had conspired to bring about petitioner's dismissal because they objected to his opposition to discrimination. The district judge held, however, that under *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), petitioner's section 1983 claim could not survive because the conspirators had hidden their motives from the Police Commissioner who made the final decision to dismiss petitioner. (App. 24a-25a).

The court of appeals affirmed dismissal of both the Title VII and section 1983 claims. The Second Circuit held that the

discrimination which petitioner had opposed did not violate Title VII itself, and that it was therefore permissible under section 704(a) for respondents to dismiss petitioner for having objected to those practices. (App. 14a-18a). The court of appeals ruled that under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the police department was not subject to suit, even if petitioner's dismissal was the result of hostility on the part of numerous high ranking officials to petitioner's opposition to racial discrimination; like the district court, the Second Circuit reasoned that the respondents were protected from legal action so long as the Police Commissioner lacked personal knowledge of the motives behind the retaliatory scheme that he consummated by dismissing petitioner. (App. 18a-21a).

Statement of the Facts

Because the courts below granted judgment as a matter of law dismissing petitioner's claims as legally insufficient, we set forth the evidence introduced in support of those claims.

Prior to the events giving rise to this litigation, petitioner had worked as a police officer for the New York City Police Department and the New York City Housing Authority Police Department. In 1993 he successfully applied to join the respondent Suffolk County Police Department, which has jurisdiction over the eastern portion of Long Island, a mixed rural and suburban area with relatively few racial minorities.

Petitioner's difficulties began shortly after he entered the Suffolk County Police Academy. As part of the Academy's intake process, petitioner was asked to fill out a "self introduction" form, setting out a brief biography and explaining why he wanted to join the Police Department. Petitioner's responses, which would haunt him throughout his all too brief career with the Suffolk County Police Department, included three statements to which his superiors took considerable offense. First, petitioner candidly articulated his general opposition to racial and other forms of discrimination. "I 'ALWAYS' treat 'all' persons with 'equal' concern and respect. . . . I am a white male who respects and admires all people."

(App. 3a). Second, petitioner stated that he regarded Justice Thurgood Marshall as his "mentor", and that his "local hero" was Judge Stuart Namm. Judge Namm was a crusading Suffolk County jurist who had worked with considerable success to oppose misconduct within the Suffolk County Police Department. Petitioner openly expressed his admiration for Judge Namm for his "courage to speak out on the injustices and collusion between the local police and prosecutors.". (App. 3a). Third, petitioner revealed that he was an active member of a police organization known as Humanity Against Hatred. Humanity Against Hatred, originally founded by a chaplin of the New York City Police Department, is an organization of federal, state, and local law enforcement officers who are opposed to discrimination and intolerance; its members include a number of other prominent officials, including a former mayor of New York City and a former governor of New York state.

The response of police officials to this biographical statement was swift and unequivocal. Petitioner testified that he was summoned to the Academy headquarters, "upbraided for the content of his self-introduction by several of his superiors . . . . [and] asked to resign." (App. 4a).

Petitioner successfully completed the Academy, and in September 1993 began his field training. What occurred thereafter was candidly summarized in a memorandum sent to the Police Commissioner five months later. "[O]nly good things were said about [petitioner] until Oct.24 . . . . After . . . he cannot ever do anything right." (App. 10a).

Racial issues arose throughout petitioner's training period. One of petitioner's field training officers's used a racial slur to refer to the African-American former mayor of New York City, David Dinkins. (App. 5a). Petitioner twice objected when his training officers without probable cause stopped vehicles because the occupants were Hispanic. Petitioner was dissuaded by his training officer from pursuing those objections, and was admonished by a training officer that his views had "alienate[d] cops" and "made [them] sick." (App. 5a). Petitioner testified that on one occasion he had heard on the police radio a reference to African-Americans as

"niggers," and that he had reported that misconduct to several of his superiors1[1]. Another officer in petitioner's presence referred to African-Americans as "spook[s]."[2] When petitioner provided assistance to an African-American family, one of his supervisors angrily demanded "whose side am I on anyway."[3]

Despite initially favorable evaluations, petitioner's situation deteriorated rapidly after October 24, 1993, when he was assigned to work under Officer Ferrante and later Officer Nolan, supervisors whom counsel for the respondent police department itself candidly characterized as the "bad F[ield] T[raining] O[fficer]s" (App. 12a). Petitioner made the mistake of discussing with Ferrante his membership in Humanity Against Hatred. Ferrante and another officer denounced petitioner as a "liberal" and a "fruitcake." According to petitioner, Officer Ferrante repeatedly used racial slurs when referring to civilians. (App. 6a).

Not surprisingly, Ferrante's written evaluation of petitioner's training was negative. Surprisingly, however, that report began with the following disclaimer by Officer Ferrante: "I am making this report for administrative purposes only and am not waiving my right to remain silent for any criminal investigation." (App. 10a n. 3). This document was among the reports ultimately reviewed by the Police Commissioner and others. Inexplicably, police officials appear to have made no effort to ascertain why Officer Ferrante thought it necessary to invoke his Fifth Amendment privilege against self incrimination, or what sort of criminal investigation he feared might arise out of his negative evaluation of petitioner. In this same period a backdated report critical of petitioner was placed in his file by another supervisor; the circumstances of that action remain in dispute. (App. 6a-7a).

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[1]Transcript of February 5, 1997, pp. 276, 280-82.

[2]Transcript of February 4, 1997, p. 120.

[3]*Id.* at 50.

After six weeks of training, petitioner met with another Lieutenant, who according to petitioner admonished him that the "stop hatred thing didn't go over well with one of my FTOs in particular . . . . my liberal school teacher mentality, didn't go over well with people at headquarters." (App. 9a). This Lieutenant did not identify by name the individuals at headquarters who objected to petitioner's views.

These events came to a head at a meeting held in January, 1994, which the court of appeals described as follows:

> Among others present were Deputy Chief Brown, Captain Rhodes, Lieutenant Murphy, Lieutenant Williams, Sergeant Brady, FTO Hodge, FTO Gormley, and FTO Ferrante. At the meeting, Lieutenant Murphy commented that "the words Mr. Wimmer select[s] to express his thoughts tend[] to make others feel that he was liberal in his viewpoint." The portion of Wimmer's personal statement referring to Judge Namm was read aloud during the meeting.

(App. 9a). The portion of the personal statement, including the reference to Justice Marshall, was read aloud at the insistence of Deputy Chief Brown. Petitioner's membership in Humanity Against Hatred was also discussed.[4]

In the wake of that meeting, Captain Brown and Deputy Chief Rhodes prepared a written recommendation that petitioner be dismissed. That recommendation was submitted to the Police Commissioner by another Chief, who expressly warned the Commissioner, in the passage quoted above, that despite early favorable evaluations after October 24 petitioner "cannot ever do anything right." The clear implication of that warning was that the subordinate officials who had given the post-October 24 negative evaluations were acting in concert and for reasons other than those disclosed in the submitted recommendation of dismissal.

The Police Commissioner, however, made no effort to

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[4]Transcript of February 10, 1997, p. 582.

ascertain why that had occurred. Instead, the Commissioner asked his legal advisor whether there was a "problem with the pattern" of concerted, apparently pretextual negative evaluations, and whether as a result termination "would present any legal problems." (App. 10a-11a). The Commissioner was advised that there would be no problems, and he then directed that a termination letter be prepared reciting as the reasons for dismissal the same negative evaluations which the Commissioner had been warned were suspiciously inconsistent with petitioner's earlier favorable evaluations.

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT'S NARROW INTERPRETATION OF SECTION 704(A) OF TITLE VII CONFLICTS WITH DECISIONS OF NUMEROUS COURTS OF APPEALS AND OF THIS COURT AND WILL INTERFERE WITH VOLUNTARY EFFORTS TO PREVENT AND CORRECT VIOLATIONS OF TITLE VII

This case concerns the viability of the informal compliance mechanisms that are the hallmark of Title VII of the 1964 Civil Rights Act. For a quarter century this Court has stressed that the preferred methods of implementing Title VII are voluntary action and pre-suit conciliation which prevent discrimination, rather than after-the-fact litigation which provides redress for violations of the law. *Albemarle Paper Co. v. Moody*, 442 U.S. 405, 417 (1975); *Kolstad v. American Dental Association*, --- U.S. --- (June 22, 1999). Effective internal corrective measures within an employer's own workforce also play an important role in reducing the large volume of employment discrimination complaints filed with the EEOC and in federal court.

The possibility that Title VII violations can be prevented or corrected by an employer itself, without the need for government intervention, depends heavily on the willingness of employees to raise with their supervisors or colleagues objections to perceived acts of discrimination. *Burlington*

Industries, Inc. v. Ellerth, 118 S.Ct. 2257, 2270 (1998). Inducing employees to come forward with information about such problems can be difficult, because workers "may well be reluctant to accept the risks of blowing the whistle on a superior." *Faragher v. City of Boca Raton*, 118 S.Ct. 2275, 2291 (1998). The statutory linchpin of this congressional plan for voluntary internal corrective mechanisms is section 704(a), which protects an employee from retaliation for opposing practices made illegal by Title VII's substantive provisions.

The lower courts are sharply divided about the scope of the protection afforded by section 704(a)[5]. In a growing number of circumstances, including the instant case, the courts of appeals have expressly held that the dismissal of an employee for opposing discrimination on the basis of race or sex is perfectly legal under section 704(a). In several circuits, including the Second, it is today foolhardy for an employee to object to perceived discrimination by his or her employer without first consulting an attorney with expertise in Title VII law. For the vast majority of employees in those circuits, who lack access to such legal advice, section 704(a) has been transformed from a salutary protection into a trap for the unwary. Increasingly employees who seek to oppose the practices forbidden by Title VII do so "at the accuser's peril." Cf. *Parker v. Baltimore & O.R.Co.*, 652 F. 2d 1012, 1019 (D.C.Cir. 1981).

The courts of appeals which have construed section 704(a) in this narrow, and ultimately counterproductive, manner have fashioned three related loopholes permitting the dismissal of an employee for objecting to intentional discrimination; each of these loopholes in section 704(a) was applied by the court of appeals below. Other circuits have properly rejected this interpretation of section 704(a).

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[5]Similar issues have arisen regarding the Age Discrimination in Employment Act. *Hedgepeth v. Kaiser Foundation Health Plan of the Northwest*, 76 F. 3d 386, 1996 WL 29252 (9th Cir. 1996).

(1) *Retaliation Against Employees Who Reasonably Misapprehend the Legal Principles Relevant to their Opposition to Discrimination*

Although Title VII contains a broad prohibition against intentional discrimination on the basis of race and gender, there are some textual and caselaw based limitations on that prohibition, limitations which would constitute a defense if the employer were sued for such intentional discrimination. Complaining employees, however, are rarely if ever aware of these technical limitations on the scope of Title VII.

The lower courts are sharply divided as to whether an employee who opposed intentional discrimination can lawfully be dismissed if the employer can later show that--unbeknownst to the employee--the discrimination in question was permissible under Title VII. The circuit courts apply three different rules to a section 704(a) retaliation claim posing this problem: (a) the limitation on Title VII is always a defense to the section 704(a) action, regardless of whether that limitation was not clearly established law at the time of the employee's complaint, (b) the limitation on Title VII is a defense only if it was clearly established law at the time of the employee's complaint, and (c) an employee's error of law regarding that scope of Title VII is not a defense to a section 704(a) retaliation claim.

(a) In the Second, Fourth and Sixth Circuits, an employer which has retaliated against an employee for complaining about intentional discrimination can defeat a section 704(a) claim if it can persuade a court, years after the complaint and retaliation, to adopt some interpretation of Title VII under which that earlier intentional discrimination would have been legal. In these circuits an employee who complains about intentional discrimination does so at his or her peril, running the risk that future developments in the law will be applied retroactively to legalize retaliation.

The instant case is a typical application of that interpretation of section 704(a). Petitioner was dismissed in January, 1994, in part because he had complained about the use of racial epithets and race-based traffic stops by his supervisors

or other Suffolk County police officers. Three years later, in the decision below, the Second Circuit held that these practices did not violate Title VII, and on that basis concluded that retaliation against petitioner was therefore permissible under section 704(a). The Second Circuit did not claim that its interpretation of Title VII was well established in 1994; to the contrary, it conceded the issue "is one of first impression in this circuit." (App. 15a).

The pivotal interpretation of Title VII in the decision below was that the discrimination about which petitioner complained could not as a matter of law create a hostile work environment for minority employees, because such abuses--even if known and offensive to minority officers--were "directed" only at civilians. For this interpretation of Title VII--on which petitioner's section 704(a) claim foundered--the court below cited only what it thought was "inherent in the definition of a racially hostile work environment." (App. 17a). The Second Circuit did not deny that that there was considerable caselaw to the contrary. In fact, decisions in the Fifth[6] and Ninth[7] circuits have held that a hostile environment claim can be based in whole or part on discrimination against or abuse directed at non-employees. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66 (1986), this Court expressly approved the Fifth Circuit decision on this issue in *Rogers v. EEOC*, 454 F. 2d 234 (5th Cir. 1971)[8]. In *Burlington Industries, Inc., v. Ellerth*, 118 S.Ct. 2257 (1998), two members of this Court described *Rogers* as "the landmark case" in the area of Title VII harassment. 118

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[6]*Rogers v. EEOC*, 454 F. 2d 234 (5th Cir. 1971).

[7]*Moyo v. Gomez*, 40 F. 3d 982, 986 (9th Cir. 1994)

[8]This Court noted that the Fifth Circuit in *Rogers* had held that "a Hispanic complainant could establish a Title VII violation by demonstrating that her employer created an offensive work environment by giving discriminatory service to its Hispanic clientele." 477 U.S. at 66.

S.Ct. at 2271 (Thomas, J., dissenting).[9]

The Second Circuit has also applied new interpretations of Title VII retroactively to dismiss earlier-filed section 704(a) retaliation claims in *Lanaux v. Central New York Psychiatric Center*, 152 F. 3d 919, 1998 WL 385913 (2d Cir. 1998)[10], and *Manoharan v. Columbia U. Col. of Phys. & Surgeons*, 842 F. 2d 590, 594 (2d Cir. 1998)(employee may be dismissed for advocating affirmative action by employer)..

The Fourth Circuit utilized the same retrospective methodology in *Mayo v. Kiwest Corp.*, 94 F. 3d 641, 1996 WL 460769 (4th Cir. 1996). The plaintiff in that case had allegedly been fired in 1995 for complaining about same-sex sexual harassment; in 1996 the Fourth Circuit held in another case that such same-sex harassment did not violate Title VII.[11] Subsequently the Fourth Circuit dismissed Mayo's section 704(a) retaliation claim on the ground that the harassment about which he had complained simply was not illegal, insisting that interpreting Title VII to apply to same-sex harassment would be "irrational". 1996 WL 460769 at *5. The court of appeals did not suggest, however, that its interpretation of Title VII had been well established when Mayo complained in 1995; to the contrary, it frankly acknowledged that at that time there was no

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[9]Justice Thomas' opinion described *Rogers* as holding that "the practice of racially segregating patients in a doctor's office could amount to discrimination in '"the terms, conditions, or privileges"' of employment, thereby violating Title VII.") '

[10]The substantive interpretation of Title VII underlying *Lanaux* was that discrimination against minority patients could not as a matter of law created a hostile environment for the minority nurses involved. The Second Circuit cited no pre-existing authority for this rule. The Fifth Circuit decision to the contrary in *Rogers* involved virtually identical facts.

[11]*McWilliams v. Fairfax County Bd. of Supervisors*, 72 F. 3d 1191 (4th Cir.), *cert. denied*, 519 U.S. 819 (1996).

caselaw on the issue.[12] (Two years after *Mayo*, of course, this Court unanimously held that same sex harassment was indeed illegal under Title VII. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998)[13].)

In *Holden v. Owens-Illinois, Inc.*, 793 F. 2d 745 (6th Cir. 1986), the district court found that the plaintiff had in fact been dismissed because of his efforts to implement a company affirmative action plan. The Sixth Circuit held that such a retaliatory dismissal was entirely lawful under section 704(a), because on its view an employer's failure to take affirmative action could never constitute a violation of Title VII, 793 F. 3d at 749, applying an interpretation of Title VII first announced only in *Holden* itself[14].

(b) The Third, Seventh, Eighth and Eleventh Circuits, on the other hand, hold that a section 704(a) claim can only be defeated by a showing that at the time the plaintiff opposed the alleged discrimination the practice in question was legal under

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[12]1996 WL 460769 at *4-*5. The district court had insisted that Mayo's complaint was groundless precisely because at the time it occurred there was no caselaw on the issue in the Fourth Circuit. *Mayo v. Kiwest Corp.*, 898 F. Supp. 335, 337 (E.D.Va. 1995).

[13]Consistent with its practice of applying retroactively to section 704(a) claims later developments in substantive Title VII law, the Fourth Circuit later reinstated a similar retaliation complaint that had been dismissed under *Mayo* in light of the decision in *Oncale*, which was handed down some three years after the retaliatory dismissal at issue. *Scott v. Norfolk Southern Corp.*, 153 F. 3d 722, 1998 WL 387192 at *2 (4th Cir. 1998)

[14]Fourteen days after the Sixth Circuit's June 18, 1986, decision in *Holden*, this Court in *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986), concluded to the contrary that there are indeed circumstances in which a court enforcing Title VII could order affirmative action. The Sixth Circuit, however, continues to insist that section 704(a) permits the dismissal of employees who advocate affirmative action. *Phillips v. Pepsi-Cola General Bottlers, Inc.*, 927 F. 2d 605, 1991 WL 27425 (6th Cir. 1991).

then existing clearly established law.

In *Berg v. La Crosse Cooler Co.*, 612 F. 2d 1041 (7th Cir. 1980), the plaintiff had been dismissed for opposing her employer's refusal to provide disability benefits to employees disabled by pregnancy or maternity. Subsequent to Berg's March 1976 dismissal, this Court held that such discrimination did not violate Title VII. *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). The Seventh Circuit nonetheless ruled that Berg's actions were protected by section 704(a). Permitting an employer to defend a retaliatory dismissal by reliance on such later legal developments, the court of appeals reasoned, would impose on employees "the sometimes impossible task of correctly anticipating how the Supreme Court may interpret a particular statute", and would "destro[y] one of the chief means of achieving [the elimination of discrimination through informal means], the frank and nondisruptive exchange of ideas between employers and employees." 612 F. 2d at 1045.[15]

In *Sisco v. J.S. Alberici Const. Co., Inc.*, 655 F. 2d 146 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982), the white plaintiff alleged that he had been dismissed in 1974 for opposing certain layoffs taken under his employer's affirmative action plan. This Court's subsequent decision in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), established that the actions to which Sisco had objected were in fact legal under Title VII. The Eighth Circuit nonetheless held that section 704(a) protected Sisco from retaliation for having opposed affirmative action which he believed was illegal under Title VII.

> We cannot say that this belief was unreasonable or in bad faith, even though we today hold, based largely on case law developed long after the events in issue, that the company's reduction in force was not unlawful.

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[15]See *Holland v. Jefferson National Life Insurance Co.*, 883 F. 2d 1307,1316 n. 6 (7th Cir. 1989)("plaintiffs 'should not be burdened with the sometimes impossible task of correctly anticipating how the Supreme Court may interpret a particular statute'")(*quoting Berg*).

655 F. 2d at 150.

Similarly, in *Drinkwater v. Union Carbide Corp.*, 904 F. 2d 863 (3d Cir. 1990), the Third Circuit held that under Title VII principles a plaintiff dismissed in 1985 for opposing a particular form of gender-based favoritism could still prevail despite an intervening 1988 decision upholding the legality of the practice to which she had objected. The Third Circuit insisted that that objection was protected because at the time it had occurred there was a "dearth of case law in this area", explaining that it would be unfair to require plaintiffs to "guess the outcome" of future litigation. 904 F. 2d at 865-66.

On the other hand, the limitations of the protection afforded to complainants by this rule is illustrated by the Eleventh Circuit decision in *Harper v. Blockbuster Entertainment Corp.*, 139 F. 2d 1385 (11th Cir. 1998). The plaintiffs in that case had been fired because they objected to their employer's facially discriminatory policy of permitting only women, but not men, to wear long hair. In dismissing their section 704(a) claim, the Eleventh Circuit stressed that at the time of that objection several circuits had agreed that such grooming standards were legal under Title VII. The court of appeals did not dispute the plaintiffs' contention that they had no actual knowledge of the Title VII caselaw, but insisted that whether their objection was "objectively reasonable" turned solely on what the law was at the time, not on what the laymen working at a video store could reasonably be expected to know about the intricacies of Title VII caselaw. 139 F. 2d at 1388-89.

(c) The Ninth and District of Columbia Circuits construe section 704(a) even more broadly, holding that employees who protest discrimination are protected by section 704(a) even if their belief in the illegality of the practice rests on a misapprehension of the law.

In *Moyo v. Gomez*, 32 F. 3d 1382 (9th Cir. 1994), the plaintiff prison guard had allegedly been dismissed for protesting discrimination against black inmates working in prison jobs. The defendant sought to dismiss the section 704(a) claim on the ground that the inmates were not "employees"

within the meaning of Title VII. The Ninth Circuit held that Moyo's complaint was protected by section 704(a), even if the inmates were not covered by Title VII at all.

> The reasonableness of Moyo's belief that an unlawful employment practice occurred must be assessed according to an objective standard--one that makes due allowance, moreover, for the limited knowledge possessed by most Title VII plaintiffs about the factual and legal bases of their claims. We note again that a *reasonable* mistake may be one of fact or law.

32 F. 3d at 1386 (Emphasis in original).

Similarly, in *Parker v. Baltimore & O.R.Co.*, 652 F. 2d 1012 (D.C.Cir. 1981), the District of Columbia Circuit insisted that a complaining employee who misapprehended the legality of the practices which he opposed would nonetheless be protected by section 704(a). The plaintiff in *Parker* had allegedly been dismissed for opposing his firm's affirmative action plan, a position that had little foundation in light of *United Steelworkers v. Weber*, 443 U.S. 193 (1979). The court of appeals rejected the company's argument that Parker's misapprehension of the scope of Title VII was fatal to his retaliation claim.

> B&O argues that most of the cases rejecting a narrow reading of the opposition clause are inapposite here, because they involve mistakes "of fact" rather than mistakes "of law." . . . [W]e find the suggested distinction irrelevant to the purposes of section 704(a). Characterization of the employee's mistake as one of fact or of law affects neither the employee's interest in action on his beliefs nor the employer's interest in asserting legitimate management prerogatives.

652 F. 2d at 1020. One ironic result of this division among the circuits is that employees who *oppose* affirmative action are

protected from retaliation in the District of Columbia and Ninth[16] circuits, while employees who *support* affirmative action are subject to dismissal in the Second and Sixth Circuits.

(d) In a long line of decisions from *Pierson v. Ray*, 386 U.S. 547 (1967) to *Wilson v. Layne*, 119 S. Ct. 1692 (1999) this Court has insisted that government officials can only be held liable in damages in actions under 42 U.S.C. § 1983 when they violated clearly established constitutional rights. These decisions stem from a consistent recognition that public officials will be deterred from the proper exercise of their duties if they are at risk of liability based on future developments in the law. State and local officials are not "charged with predicting the future course of constitutional law." *Pierson v. Ray*, 386 U.S. at 557.

The interpretation of section 704(a) utilized in the Second, Fourth and Sixth Circuits is fundamentally at odds with this Court's qualified immunity decisions. As this Court noted in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), if government employees risked being mulct in damages if they failed to predict future legal developments, that risk would "dampen the ardor of all but the most resolute." 457 U.S. at 814. The construction of section 704(a) applied in these circuits will have on opponents of intentional discrimination precisely the chilling effect which this Court's qualified immunity decisions are framed to avoid.

In the context of this case the conflict between these two lines of decisions yields a perverse result. Where, as here, government officials set out to dismiss an employee because they object to his opposition to discrimination, in any section 1983 action the perpetrators will be protected by qualified immunity from future developments in or clarifications of First Amendment law, but the victim can be denied the protection of section 704(a) on the basis of later developments in Title VII

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[16]See *Nelson v. Pima Community College*, 83 F. 3d 1075, 1082 (9th Cir. 1996)(assuming without deciding that opposition to affirmative action is protected by section 704(a)).

law.

(2) *Retaliation Against Employees Who Reasonably Misapprehend Facts Relevant to Their Opposition to Discrimination*

Seven circuits--the First[17], Third[18], Fifth[19], Sixth[20], Eighth[21], Tenth[22] and District of Columbia[23] circuit courts of appeals--hold that a section 704(a) plaintiff is not required to establish by a preponderance of the evidence that his or her employer in fact violated Title VII; to obtain the protections of section 704(a), a plaintiff need only demonstrate that he or she reasonably believed that discrimination had occurred. On the other hand, four circuits--the Second, Seventh, Ninth and Eleventh--hold that a retaliation victim must establish certain factual elements of the asserted Title VII violation in order to be protected by section 704(a).

There appears to be little rhyme or reason to which

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[17]*Montiero v. Poole Silver Co.*, 615 F. 2d 4, 8 (1st Cir. 1980).

[18]*Drinkwater v. Union Carbide Corp.*, 904 F. 2d 853, 865 (3d Cir. 1990).

[19]*De Anda v. St. Joseph Hosp.*, 671 F. 3d 850, 853 n. 2 (5th Cir. 1982); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F. 2d 1130, 1140 (5th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982).

[20]*Booker v. Brown & Williamson Tobacco Co.*, 879 F. 2d 1304, 1312-13 (6th Cir. 1989).

[21]*Wentz v. Maryland Casualty Co.*, 869 F. 2d 1153, 1155 (8th Cir. 1989); *Sisco v. J.S. Alberici Const. Co., Inc.*, 655 F. 2d 146, 150 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982).

[22]*Love v. RE/MAX of Am., Inc.*, 738 F. 2d 383, 385 (10th Cir. 1984).

[23]*Parker v. Baltimore & O.R.Co.*, 652 F. 2d 1012, 1020 (D.C.Cir. 1981)

elements of the underlying Title VII objection these courts have chosen to require a section 704(a) plaintiff to establish. Perhaps coincidentally, most of these special proof requirements have been imposed on section 704(a) plaintiffs who opposed racial or sexual harassment. Proof of the merits of a Title VII hostile environment harassment claim is complex, requiring a demonstration of four distinct elements: (a) that the harassment was based on gender, race, or some other forbidden characteristic, (b) that the victim subjectively perceived the resulting environment as hostile, (c) that a reasonable person would have regarded that environment as hostile, and (d) that a factual basis exists for attributing that environment to the employer. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. ---, 118 S.Ct. 998 (1998); *Faragher v. City of Boca Raton*, 118 S.Ct. 2275 (1998).

In the instant case, the Second Circuit insisted that a section 704(a) plaintiff dismissed for opposing harassment must prove the existence of the second element: "because Wimmer did not *introduce evidence* that minority employees of the department felt that they worked in a racially hostile environment, Wimmer could not reasonably have believed that he was protesting an unlawful work environment." (17a)(Emphasis added). That is, unless petitioner could *prove* that minority workers perceived a hostile environment, petitioner's belief that he was objecting to illegal conduct would be unreasonable and thus unprotected. In the instant case, of course, one of the incidents about which petitioner had complained was a reference to African American civilians, broadcast on the police radio, as "niggers." Any person of ordinary sensibility would conclude that this would be offensive to African American officers, but for the Second Circuit that was insufficient. The court of appeals insisted on precisely the evidence required to establish a harassment claim on the merits--testimony by minority officers that they in fact regarded the resulting environment as hostile.

The Seventh Circuit requires a section 704(a) plaintiff to establish the existence of the first element of a harassment

claim--that the harassment was discriminatory. In *Erwin v. Jerome Foods, Inc.*, 51 F. 3d 275, 1995 WL 115870 (7th Cir. 1995), the male plaintiff had complained to high ranking company officials about what he believed was sexual harassment by his male supervisor. The court of appeals upheld dismissal of Erwin's section 704(a) retaliation complaint because he had not established the necessary discriminatory motive on the part of his supervisor.

> Assuming that Erwin held a sincere belief that he was complaining of unlawful conduct, this belief was unreasonable. . . . Although [the supervisor's] language was sexually explicit and vulgar, it was neither discriminatory not intended to harass Erwin because of his gender. . . . Because his supervisor's language was not discriminatory, Erwin's belief that he was challenging unlawful conduct was unreasonable.

1995 WL 115870 at *4.

The Second, Ninth and Eleventh Circuits require a section 704(a) plaintiff to establish the facts sufficient to hold the employer liable for the hostile work environment complained of. In *Little v. United Technologies*, 103 F. 3d 956 (11th Cir. 1997), the plaintiff had been disciplined after he objected that a white employee had remarked, "Nobody runs this team but a bunch of niggers . . . ." 103 F. 3d at 958. The Eleventh Circuit held that Little's objection was not protected activity under section 704(a), because Little had not demonstrated that the employer was legally accountable for the abuse.

> Little's opposition to the racial remark . . . is protected conduct within the parameters of the statute only if [that abusive] conduct can be attributed to [the employer]. Based on the facts of this case, we conclude that [the harasser's] racially offensive comment alone is not attributable to [the employer] and, accordingly, Little's opposition to the remark did not constitute opposition to an unlawful employment practice.

103 F. 3d at 959-60. In *Couture v. JMJ, Inc.*, 172 F. 2d 875, 1999 WL 140603 (9th Cir. 1999), the plaintiff had allegedly been retaliated against because she complained that one of her subordinates was being racially harassed by a co-worker. The Ninth Circuit upheld an award of summary judgement against the plaintiff.

> To be deemed "protected activity," opposition must be directed at "an unlawful employment practice of an employer" . . . . Couture has presented no *evidence* that the [employer] either ratified or acquiesced in the harassment at issue.

1999 WL at *1 (Emphasis added).[24] Similarly, in *Reed v. A.W. Lawrence & Co., Inc.*, 95 F. 3d 1170 (2d Cir. 1996), the Second Circuit held that a woman allegedly dismissed for complaining about sexual harassment could not prevail under section 704(a) unless she demonstrated at trial that her employer was legally responsible for that harassment, such as by adducing "*evidence* from which a jury could conclude that the defendant's procedures did not 'provide a reasonable avenue of complaint.'" 95 F. 3d at 1181 (Emphasis added).

The requirement imposed by the Second Circuit below, and by the Second, Seventh, Ninth and Eleventh Circuits in other cases, is manifestly inconsistent with the majority rule that a section 704(a) plaintiff need not establish the merits of his or her underlying complaint. No less importantly, requirements of this sort will ordinarily deter a prudent employee from making any effort to oppose ongoing acts of discrimination. For example, in the Second, Ninth and Eleventh Circuits a woman who complains about sexual harassment by a co-worker will not be protected by section 704(a) unless the employer has in fact

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[24]See *Folkerson v. Circus Circus Enterprises, Inc.*, 107 F. 3d 754,756 (9th Cir. 1997)("to satisfy the first element in a prima facie case of retaliation, Folkerson must show sufficient *facts* to impute the actions of the [harasser] to her employer. We conclude that Folkerson failed to show any *facts* which would indicate that Circus Circus in any way ratified or acquiesced in the . . . alleged sexual harassment")(Emphasis added).

been negligent in dealing with that co-worker's conduct. But a sexual harassment victim often would not know if the employer had in the past been negligent in dealing with harassment by that co-worker, and any effort on the victim's part to inquire about past complaints might itself lead to legally permissible retaliation.

This second judicially created loophole in section 704(a) is necessarily related to the first. Courts could not fault retaliation victims for failing to prove some element of their underlying discrimination complaint unless the employees were held responsible for knowing--or perhaps anticipating--each of the elements needed to establish that the merits of that original complaint. In the instant case, for example, the Second Circuit's reasoning necessarily rests on the assumption that an employee who complains about racial or sexual harassment is charged with constructive knowledge that racial harassment is only illegal if the victims regard that abuse as creating a hostile environment.

(3) *Retaliation Against Employees Who Express Generalized Opposition to Discrimination*

These first two loopholes in section 704(a) might be less harmful if an employee could make to his or her employer a generalized complaint of discrimination. There would be relative safety in the vagueness of such an objection, because courts could not later hold that some specific action complained of was in fact legal, or lacked sufficient evidentiary support. The Ninth Circuit holds that complaints of this type are in fact protected by section 704(a). "A letter protesting unspecified 'racism' and 'discrimination' in employer practices is protected opposition activity." *Jok-Ef v. Columbia Basin CLG.*, 66 F. 3d 335, 1995 WL 527996 *6 (9th Cir. 1995).

Three other circuits, however, hold that complaints of this sort fall outside the protection of section 704(a). In *White v. Rice*, 46 F. 3d 1130, 1995 WL 20796 (4th Cir. 1995), the Fourth Circuit ruled that "generalized verbal complaints" are not protected activity, distinguishing such objections from those in

which an employee "detail[ed] hiring practices and job conditions" which he or she claimed were discriminatory. 1995 WL 20796 at *3. Similarly, the Sixth Circuit holds that "[a]n employee may not invoke the protections of the Act by making a *vague* charge of discrimination." *Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F. 2d 1304, 1313 (6th Cir. 1989)(emphasis added). In the instant case the Second Circuit joined this narrow reading of section 704(a), insisting that an employee could lawfully be fired for "opposing racist practices [by his or her employer] *generally*." (17a)(Emphasis added).

The circumstances of the instant case provide a stark illustration of the importance and danger of the rule in the Second, Fourth and Sixth Circuits permitting dismissal of an employee for expressing general opposition to intentional discrimination. The respondent police department has a long, troubled history of litigation and disputes about employment discrimination. The supervisors and training officers angered by petitioner's praise for Justice Marshall and Judge Namm knew exactly what petitioner's attitude toward employment discrimination was, and that he would not hesitate to object to any specific abuses which he saw. The dismissal of petitioner was largely a preemptive strike aimed at removing him before he could make and act on more specific complaints; the decision of the Second Circuit legalizes just such a tactic for perpetuating violations of Title VII.

II. THE "POLICY OR CUSTOM" REQUIREMENT OF *MONELL V. NEW YORK CITY DEPT. OF SOCIAL SERVS.*, 436 U.S. 658 (1978), AND ITS PROGENY SHOULD BE OVERTURNED OR CLARIFIED

Two decades ago, in *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978), this Court held that local government bodies, although "persons" within the meaning of section 1983, could only be sued for constitutional violations which stemmed from a "policy" or "custom." 436 U.S. at 690-95. In the years that have followed, a series of decisions by this Court, in tandem with innumerable lower court opinions,

have created an increasingly complex interpretation of these requirements. In *Board of County Commissioners of Bryan County v. Brown*, 117 S.Ct. 1382 (1997), four members of this Court suggested that the holding of *Monell* and its progeny should be reconsidered. 117 S.Ct. at 1400 (Souter, J., dissenting), 1401-1404 (Breyer, J., dissenting). Subsequent developments have further eroded the rationale of *Monell*. This case provides a particularly appropriate occasion for reconsidering the policy or custom requirement.

Justice Breyer's opinion in *Bryan County* delineates a number of factors supporting reexamination of *Monell* and its progeny. We set forth below several additional considerations warranting such reexamination, as well as particularly relevant circumstances in the instant case.

The now complex *Monell* jurisprudence began with a considerably simpler premise, that Congress did not intend that a city or county could be held liable merely because it employed an individual who had committed a constitutional violation[25]. No opinion, however, has ever suggested that this caselaw, or *Monell's* original "policy or custom" formulation itself, were grounded directly in the text or legislative history of section 1983. Rather, each additional limitation has been justified as the sole practicable alternative to holding a city liable for having done no more than employ an individual who violated a plaintiff's constitutional rights. Only application of this ever more complicated and restrictive body of law, past opinions argued, could prevent the liability standard "from collapsing into *respondeat superior* liability." *Bryan County*, 117 S. Ct.

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[25]*Board of County Commissioners of Bryan County v. Brown*, 117 S.Ct. 1382, 1388 (1997)(*quoting Monell*); *Pembaur v. Cincinnati*, 475 U.S. 469, 478 (1986)(*quoting Monell*); *Oklahoma City v. Tuttle*, 471 U.S. 808, 824 (1985)(jury charge improper because it permitted jury to impose liability on the city "based solely upon proof that it employed a nonpolicymaking officer who violated the Constitution"); *Monell*, 436 U.S. at 692 (statutory language "cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor.")

at 1391; see *Canton v. Harris*, 489 U.S. 378, 392 (1989)(any "lesser standard of fault would result in *de facto respondeat superior* liability on municipalities.")

Since *Bryan County*, however, this Court has concluded to the contrary, holding instead that it is indeed possible to formulate a completely different and considerably less restrictive standard which also stops well short of *respondeat superior*. In *Burlington Industries, Inc. v. Ellerth*, 118 S.Ct. 2257 (1998), the Court fashioned a standard of employer liability for sexual harassment with the express purpose of establishing a rule that "requires the existence of something *more* than the employment relation itself." 118 S. Ct. at 2268 (Emphasis added). This is precisely the purpose underlying the policy or custom requirement of *Monell* and its progeny. But in *Burlington Industries* the Court concluded that a non-*respondeat superior* rule could be fashioned without any of the restrictions and intricacies of the *Monell* jurisprudence.

First, this Court held in *Burlington industries* that where an employee has been injured by a tangible employment action "beyond question, *more* than the mere existence of the employment relation aids in the commission of the [violation]". 118 S. Ct. at 2268 (Emphasis added). "A tangible employment decision requires an official act of the enterprise, a company act." 118 S.Ct. at 2268. These holdings are palpably inconsistent with the insistence in the *Monell* line of cases that the policy or custom requirement is the only practicable alternative to *respondeat superior*, and that only actions by policymakers can fairly be said to be acts of their municipal employers. It is difficult to see, for example, how the dismissal of a county employee can be an "official act" for purposes of Title VII, *Burlington Industries*, 118 S.Ct. at 2268, but not the "ac[t] of the *municipality*" for purposes of section 1983. *Pembaur v. Cincinnati*, 475 U.S. 469, 479 (1986)(emphasis in original).

Second, in the absence of such an official act, *Burlington Industries* concluded--again to avoid holding a defendant liable based solely on the fact that the misconduct at

issue was engaged in by an employee--that an employer should be permitted to establish an affirmative defense by showing that it had exercised reasonable care to prevent the misconduct, and that the victim unreasonably failed to mitigate damages by utilizing some corrective mechanism. Recognition in section 1983 litigation of such an affirmative defense would manifestly result in a liability rule different than *respondeat superior*, without need for the elaborate *Monell* jurisprudence.

The circumstances of this case illustrate the perverse incentives that have been the cumulative effect of the *Monell* progeny. *Bryan County* held that even where a policymaker has reason to know that his action is likely to lead to some constitutional violation, he is under no obligation to ask questions or otherwise investigate the possible consequences. 117 S.Ct. at 1392-93. *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), held that a city faces no liability under section 1983 if subordinate officials are careful not to tell a policy maker about the unconstitutional purposes behind some proposed action. In the wake of these decisions, "don't ask, don't tell" has become the ideal government policy for avoiding liability in a section 1983 action, just as it was under the Eleventh Circuit decision overturned in *Faragher v. City of Boca Raton*, 118 S.Ct. 2275 (1996); see 111 F. 3d 1530, 1546-47 (11th Cir. 1997)(Tjoflat, J., dissenting).

In the instant case, exploiting these rules to the hilt, a veritable platoon of high ranking and other police officials allegedly concocted a pretext for dismissing petitioner, and the police chief--warned in writing that the proposed reasons for that dismissal were indeed pretextual--was assured that petitioner could nonetheless be dismissed with impunity. In the courts below, respondents argued with success that this very scheming and deliberate blindness precluded liability under *Monell*. In *Burlington Industries* the Court held, to the contrary, that such unthinking ratification of the proposals of improperly motivated subordinates would result in liability. 118 S.Ct. at 2269 (*citing Shager v. Upjohn Co.*, 913 F. 2d 398 (7th Cir. 1990)). But such a lack of reasonable care, the touchstone of lability under *Burlington Industries*, is often, as here, an affirmative defense

under *Monell*.

This case also illustrates that municipalities have not, in reliance on *Monell*, somehow adjusted their financial affairs on the assumption that they will only incur financial liability in those rare cases where a constitutional violation involves a policy or custom. New York law requires cities and counties to "indemnify and save harmless" any employee held liable for conduct that was "within the scope of his public employment or duties". Public Officers Law, § 18(4)(a). Many states impose similar indemnification obligations on their cities and counties. *Bryan County*, 117 S.Ct. at 1404 (Breyer, J., dissenting).

The opinion below also demonstrates the seemingly limitless confusion and complexity of *Monell* jurisprudence. The scheme to dismiss petitioner involved a Chief, a Deputy Chief, two Captains, two Lieutenants, one Sergeant, and numerous training officers, a far cry from the "one 'bad apple'" for which this Court in *Oklahoma City v. Tuttle*, 471 U.S. 808, 812 (1985), insisted that a city should not be responsible. The Second Circuit dismissed this widespread participation on the ground that there was no evidence that "the [Police] Commissioner had *established* a . . . custom, in a broad sense, of terminating probationary officers for their political beliefs, or even of fostering an environment conducive to such actions." (19a)(Emphasis added). The court of appeals' insistence that a custom must be "established" by a policymaker is assuredly inconsistent with even *Monell*; the whole purpose of the "custom" element of the *Monell* line of cases is to impose liability where a policymaker had not acted. The specificity of the custom required by the court below poses yet another conundrum under *Monell*. There was substantial evidence of widespread animus within the Suffolk County Police toward officers who opposed discrimination or reported possible misconduct, the all too common "blue wall of silence"; but the specific way in which that custom was enforced, in this case by procuring the dismissal of a non-conforming officer on pretextual charges, may not itself be a "custom" in the sense that it occurs regularly, or indeed has occurred before at all. In addition, the courts below applied *Monell* to bar petitioner's

claim for injunctive relief. Presumably yet additional elaborations of *Monell* could be framed to correct these errors, but it would be more appropriate instead to reassess the wisdom of the seemingly endless process to which *Monell* and its progeny have led of fashioning ever new legal doctrines about the policy or custom requirement.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

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